

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON

In re:  
  
SAMIA EL-MOSLIMANY  
  
Debtor

Case No. 18-14820-CMA  
Chapter 7

**DEBTOR'S RESPONSE TO MOTION TO  
LIST PROPERTY AND APPROVE  
COMPROMISE**

COMES NOW Samia El-Moslimany ("Samia"), and makes the following objection to the trustee's motion (Docket #148, the "Motion") to list her homestead for sale, and to approve a compromise with judgment creditor Hayat Sindi ("Sindi"). This is a proposed short sale.

**1. SUMMARY OF ARGUMENT**

The trustee's Motion is unwise and unnecessary. It will most likely drive this estate further into administrative insolvency, while depriving a family of its homestead property (the "Homestead") for no discernable benefit to creditors. There is no immediate threat that the property will be lost to foreclosure. There is no showing that the trustee will likely prevail on the merits of his avoidance action against Ms. Al-Yousef ("Al-Yousef"). And there is no commitment that any portion of the sale proceeds will go to unsecured creditors.

**2. WASHINGTON FEDERAL PAYMENT STATUS**

The trustee complains that Samia is not making mortgage payments to the first

1 mortgage holder, Washington Federal Bank. The short answer to this is that Washington  
2 Federal refuses to accept any payments short of a complete cure. See Declaration of  
3 Donald A Bailey, Exhibit A. Samia would gladly make adequate protection payments to  
4 Washington Federal, if it could be made to accept them. Another response to this is to  
5 point out that no foreclosure by Washington Federal is pending, or even threatened, at  
6 this point in time. Moreover, according to the trustee's own realtor, the Homestead is  
7 appreciating in value faster than the debt to Washington Federal is increasing<sup>1</sup>.

### 8 **3. THE PROPOSED SALE WILL NOT BENEFIT UNSECURED CREDITORS**

9 The trustee expects between \$78,000 and \$90,000 of net proceeds from the sale of  
10 the Homestead<sup>2</sup>. Half of this will go to judgment lien creditor Sindi. The other half will  
11 be divided between the bankruptcy estates of Samia and her mother and co-owner, Ann  
12 El-Moslimany ("Ann"). So each estate will net, at best, \$19,500 to \$22,500 from the sale.  
13 There is no commitment to allocate any portion of the proceeds to unsecured creditors.  
14 The administrative expenses in this case alone currently exceed \$96,000<sup>3</sup>. So the sale  
15 itself will generate no benefit for creditors, and will leave the Samia bankruptcy estate  
16 still administratively insolvent by over \$50,000. The court should not approve a short  
17 sale where there is no benefit to unsecured creditors.

18 Even if all the proceeds of the projected sale were to go to creditors, a return to  
19 the estate of \$22,500 would result in a dividend of only 1%. This is insufficient to justify  
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21 <sup>1</sup> The Declaration of Rik Jones alleges that the property has increased in value by \$100,000 to  
22 \$150,000 since he evaluated it in August 2019. The trustee asserts that the debt to Washington Federal has  
increased by \$60,000 in that time.

23 <sup>2</sup> The trustee's calculation of how much money must be set aside to satisfy the disputed secured  
24 interest of Al-Yousef is off by over \$100,000. See below at page 4-5.

25 <sup>3</sup> See the email from Denice Moewes to Donald Bailey attached as Exhibit B to the Bailey  
26 Declaration.

1 the sale of the Homestead.

2 Generally, unless a certain minimum value, as set forth in guidelines of the  
3 United States Trustee from time to time, can be realized, trustees are  
4 strongly discouraged from liquidating assets in nominal asset cases.  
5 Indeed, the legislative history of the Code made clear Congress's  
6 displeasure with prior practices under which trustees' administration of  
7 "nominal asset cases" benefitted only the trustees themselves." 6 Collier  
8 on Bankruptcy ¶704.02[2] (16<sup>th</sup> Ed. 2021)

9 Under the scenario contemplated by the Motion, the only way there is a benefit to  
10 creditors is if the trustee avoids the Al-Yousef deed of trust and it is preserved for the  
11 benefit of the estate. And the only way the Al-Yousef deed of trust is preserved for the  
12 benefit of the estate is if it avoided as an actual fraud. If the trustee only succeeds in  
13 proving that the deed of trust secures a much smaller amount of debt than is claimed,  
14 there will be no lien to be preserved for the benefit of the estate, and Sindi's judgment  
15 lien will absorb any equity thus generated.

16 **4. THE TRUSTEE HAS NOT DEMONSTRATED A BONA FIDE DISPUTE UNDER**  
17 **SECTION 363(f)(4)**

18 The avoidance action against Al-Yousef has been pending one year and seven  
19 months. The trustee apparently has little or nothing to show for that time and effort.  
20 Certainly, the trustee has not attempted to make any factual showing that the Al-Yousef  
21 avoidance action has probable merit or likelihood of success. The trustee has simply  
22 made the conclusory statement that the Al-Yousef deed of trust is subject to a bona fide  
23 dispute.

24 The trustee has the burden of demonstrating that a bona fide dispute  
25 exists. To meet this burden the trustee must establish that there is an  
26 objective basis for either a factual or legal dispute as to the validity of the  
27 debt. The court is not required to resolve the underlying dispute as a  
28 condition to authorizing the sale under this provision, but must determine  
that it exists. 3 Collier on Bankruptcy ¶363.06[5] (16<sup>th</sup> Ed. 2021)

While it is true that the court does not have to definitively resolve the dispute to order a  
sale under section 363(f)(4), the party seeking to sell free and clear of liens ought to be

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1 able to articulate the factual and legal basis of the dispute beyond the bare allegations of  
2 the complaint. Here, the trustee has not done so<sup>4</sup>.

3 The only creditors who will get any money from the proposed sale itself are  
4 Washington Federal and Sindi. Sindi's entitlement to the net proceeds is based on her  
5 judgment lien, recorded September 25, 2018 (Exhibit 4 to declaration of Denice Moewes,  
6 Docket # 149). The petition in this case was filed on December 20, 2018, less than 90  
7 days after the judgment lien was recorded. The only reason the judgment lien still exists  
8 is that the trustee missed the statute of limitation for avoidable preferences. Courts  
9 should be especially wary when a bankruptcy trustee throws in his lot with a secured  
10 creditor. *In re Preston Lumber Corp.*, 199 B.R. 415 (Bankr. N.D. Cal. 1996).

11 This court has repeatedly cautioned trustees about pursuing litigation without a  
12 reasonable prospect of benefit to creditors. It should so caution the trustee in this case.  
13 If it has cost the estate \$96,000 to get to this point, with apparently little to show for it,  
14 how much more will it cost to get through trial? Is the risk of deepening administrative  
15 insolvency worth the remote possibility of a potential benefit to creditors? A reasonable  
16 cost-benefit analysis would show that this litigation is a mistake.

17 Add to this the fact that pursuing this litigation actually endangers the defendant  
18 in Saudi Arabia. Is seeing Ms Al-Yousef imprisoned and endangered worth a 10% or  
19 20% return to unsecured creditors?

## 20 **5. THE SET-ASIDE FOR THE DISPUTED DEED OF TRUST IS INSUFFICIENT**

21 The trustee proposes to set aside \$446,000 from the sale of the Homestead to  
22 satisfy the Al-Yousef deed of trust in the event the trustee's avoidance action is  
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24 <sup>4</sup> With regard to the allegation that the funds were not actually loaned by Al-  
25 Yousef to Samia, see the Second Supplemental Declaration of Samia El-Moslimany,  
26 Docket 130-1 and exhibits thereto, detailing each advance with backup documentation.

1 unsuccessful. That is the face amount of the two notes secured by the deed of trust,  
2 without interest, but it is not sufficient to satisfy Al-Yousef's claim. Samia and Al-  
3 Yousef assert that Al-Yousef's deed of trust secures a total of \$574,536, including the  
4 notes themselves and subsequent advances (only \$26,667 of the subsequent advances are  
5 post-petition). See Second Supplemental Declaration of Samia El-Moslimany, Docket  
6 130-1 and exhibits thereto.

7 At a minimum, if the trustee is selling property under section 363(f)(4) based on a  
8 bona fide dispute, he or she must set aside sufficient proceeds to satisfy the full amount  
9 of the claim that is in dispute; in other words, the trustee must assume, for purposes of  
10 setting aside funds, that the party whose interest is disputed will prevail on all its  
11 claims.

12 Thus, based on a projected sale price of \$1,300,000, the proposed sale will be  
13 insufficient to set aside funds for the Al-Yousef deed of trust and also pay the two  
14 homestead exemptions:

Gross Sale Price	\$1,300,000
Costs of Sale (8%)	- \$104,000
Washington Federal	- \$410,000
Al-Yousef Deed of Trust	- \$574,536
Samia's Homestead	- \$125,000
Ann's Homestead	- \$125,000
Net Proceeds	- \$38,536

21 In fact, to generate \$90,000 of net proceeds, the Homestead must sell for at least  
22 \$1,440,000. Nor has the trustee accounted for possible income tax on the capital gain  
23

1 generated by the sale of the Homestead<sup>5</sup>.

2 **6. THE TRUSTEE SHOULD NOT BE AUTHORIZED TO EVICT THE DEBTOR**  
3 **AND HER FAMILY PENDING SALE**

4 In addition to sale of the Homestead, the trustee seeks authority to evict Samia  
5 and her family and rent the property<sup>6</sup>. In addition to Samia herself, her foster son and  
6 his wife and three small children live in the Homestead. The trustee thinks he can get  
7 \$4000 to \$5000 per month rent, but is equivocal as to whether he would keep the rental  
8 income or attempt to pay it to Washington Federal. (As mentioned above, Washington  
9 Federal has steadfastly refused to accept payments from Samia.)

10 This makes no sense. What tenant would move into a \$5000/month rental  
11 without at least a year lease? And what buyer will close on a property occupied by a  
12 tenant with an unexpired lease? Simply put, leasing the property is inconsistent with  
13 expeditiously marketing it.

14 The Washington homestead exemption protects more than a right to receive up to  
15 \$125,000 on the forced sale of one's residence. It also protects a right of possession, a  
16 right to keep a roof over one's family's head. R.C.W. 6.13.010(1): "The homestead  
17 consists of real or personal property that the owner uses as a residence." *Bank of*  
18 *Anacortes v. Cook*, 10 Wn. App. 391 (Wash. Ct. App. 1974); See also Senate Bill 5408,  
19 section 4(2), pending signature by the Governor: "In a bankruptcy case, the debtor's  
20 exemption shall be determined on the date of the bankruptcy petition. If the value of the  
21 \_\_\_\_\_

22 <sup>5</sup> The Homestead was originally purchased by Samia's parents in 1968 for about \$40,000. A 50%  
23 interest was gifted to Samia in 2008. It was remodeled in 2006-2010, at a cost of approximately \$369,000  
24 (Bailey Declaration Exhibit C). Thus, a sale at \$1,440,000 will generate taxable gain of \$531,000: \$1,440,000  
- \$500,000 (two exclusions) - \$409,000 (basis) = \$531,000 taxable gain.

25 <sup>6</sup> The proposed order is unclear as to whether the trustee is given authority to demand turnover at  
26 a future date without court order, or whether turnover would be subject to further hearing.

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1 debtor's interest in homestead property on the petition date is less than or equal to the  
2 amount that can be exempted under RCW 6.13.030, then the debtor's entire interest in  
3 the property, *including the debtor's right to possession* and interests of no monetary value,  
4 is exempt." (Emphasis added) The exempt funds are intended, in the case of a voluntary  
5 sale, to be re-invested in a new homestead; that is, to give the unfortunate debtor the  
6 means to be housed in the future. R.C.W. 6.13.070(1). A debtor should only be evicted  
7 from homestead property if they are seriously interfering with or impeding the trustee's  
8 efforts to sell the property, or are damaging the property. Failure to pay mortgage  
9 payments is not such a circumstance, particularly when the lender refuses to accept such  
10 payments.

11 In *In re Szekely*, 936 F.2d 897 (7<sup>th</sup> Cir. 1991), Judge Richard Posner held that a  
12 debtor may not be forced to turn over their homestead property until they receive their  
13 homestead exemption in cash. He reasoned that the value of a homestead exemption is  
14 diminished to the extent the debtor must wait for it following eviction from the  
15 homestead property. Although the opinion turned in part on Illinois law<sup>7</sup>, it contains an  
16 interesting discussion of the balance and tension between the Bankruptcy Code's debtor  
17 relief policy and its creditor recovery policy.

18 The trustee had demanded that the Szekelys pay rent as a condition of remaining  
19 in the property pending sale.

20 Because the house belongs to the estate, the trustee can pay the Szekelys  
21 their \$15,000 and tell them to skedaddle, and then rent the house to  
whomever he pleases until he sells it. That much is clear<sup>8</sup>. . . .

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22  
23 <sup>7</sup> The Illinois and Washington homestead statutes are very similar. Compare 735 ILCS 5/12-901 to  
24 RCW 6.13.010. If anything, the Washington statute is more protective of the right of possession than the  
statute construed by Judge Posner.

25 <sup>8</sup> It should be noted that *Szekely* was a case where there clearly was substantial equity above the  
26 homestead exemption. That is not the case here.

1 Some brokers believe that it is more difficult to sell a house with a tenant in  
2 it than with the house vacant ... This suggests that he [trustee] too is  
3 seeking a windfall, and that the real purpose of his charging rent was to  
4 induce the Szekelys to leave, so that the house could be sold more easily.  
5 To cast them out into the cold, as it were, without giving them the \$15,000  
6 to which the homestead exemption entitled them, undermined the purpose  
7 of the exemption, which is to assure the debtor adequate housing despite  
8 the economic disaster that has overtaken him. The harm to the debtor  
9 depends on how long it takes to sell the house. If it is sold right off, he gets  
10 the cash value of the exemption; but if there is a delay in selling it, he must  
11 arrange for substitute housing without the assistance that Illinois meant  
12 him to have through the homestead exemption. *Szekely* 396 F.2d at 902.

13 Finally, there is a pandemic in progress. The trustee, in operating the property as  
14 a rental, must comply with local laws. Evictions are prohibited as a matter of critical  
15 public health policy. These prohibitions exist on the state and federal level. See  
16 Proclamation by the Governor Extending and Amending 20-05 and 20-19, et seq. 20-19.6  
17 Evictions and Related Housing Practices (March 31, 2021), and “Temporary Halt in  
18 Residential Evictions to Prevent the Further Spread of COVID-19” (85 Fed. Reg. 55292,  
19 September 4, 2020) promulgated by the Centers for Disease Control under Section 361 of  
20 the Public Health Service Act (42 U.S.C. § 264) and 42 C.F.R. § 70.2. Under these  
21 circumstances, putting Samia and her family out on the street would be both immoral  
22 and illegal.

## 23 7. ISSUES WITH THE FORM OF PROPOSED ORDER

24 If the court grants the trustee’s motion, the proposed order should be revised to  
25 provide:

- 26 1. That turnover of the Homestead will be subject to further notice and hearing,  
27 based on a showing that the debtor’s occupancy is interfering with sales efforts.
- 28 2. That any proposed sale will have to generate funds sufficient to pay the two  
homestead exemptions at \$125,000 each, and set aside \$574,536 for the Al-Yousef deed of  
trust.
3. That the homestead exemptions, when paid, will be free and clear of any

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1 claims of creditors, including non-dischargeable debts, pursuant to Bankruptcy Code  
2 §522(c).

3 **8. CONCLUSION**

4 The court denied, without prejudice, the debtor's motion to abandon the  
5 Homestead until the avoidance action against Al-Yousef is resolved. The motion to list  
6 the Homestead for sale should likewise be denied until the Al-Yousef adversary  
7 proceeding is resolved, or until there is some actual danger that the property will be lost  
8 to foreclosure. What is fair for the debtor ought to be fair for the trustee. Then the  
9 Homestead should be sold only if the trustee can demonstrate that there will in fact be  
10 more than a minimal benefit to unsecured creditors.

11 Dated: April 23, 2021

12 DONALD A BAILEY  
13 Attorney at Law

14 /s/ Donald A Bailey  
15 WSB#12289  
16 Attorney for Debtor

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